Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS GAMBINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 30, 1995

QUESTIONS PRESENTED

1. Whether the mandatory dismissal provisions of the Speedy Trial Act allow a conviction to be affirmed on the ground that, because the defendant would likely have been reindicted, the failure to dismiss was "harmless error"?

2. Whether this Court should resolve a conflict among the circuit courts of appeals on the issue whether a district court may allow effectively unlimited tolling of time limits under the Speedy Trial Act by deferring resolution of a pretrial evidentiary motion until during or after trial?

LIST OF PARTIES

The defendants named in the original indictment were John Gotti, Salvatore Gravano, Frank LoCascio and petitioner Thomas Gambino. Thomas Gambino's trial was severed from that of the other defendants. Thereafter, a superseding indictment was returned that named petitioner, Giuseppe Gambino and Philip Loscalzo as defendants. Loscalzo died before trial, and petitioner was tried with Giuseppe Gambino. Giuseppe Gambino was acquitted.

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No.

In The

Supreme Court of the United States

October Term, 1995

THOMAS GAMBINO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Thomas Gambino respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction for violating the RICO statute even though the court of appeals concluded that petitioner's rights under the Speedy Trial Act (the "Act") had been violated and that the district court therefore had erred in not dismissing petitioner's indictment.

OPINIONS BELOW

The court of appeals' opinion affirming petitioner's conviction is reported at 59 F.3d 353 (2d Cir. 1995), and appears at 1a.[1] The court of appeals' order denying the petition for rehearing appears at 109a. The opinion of the district court denying petitioner's motion to dismiss the indictment is reported at 818 F. Supp. 541 (E.D.N.Y. 1993), and appears at 82a. The district court's opinion denying petitioner's motion for a new trial is reported at 835 F. Supp. 74 (E.D.N.Y. 1993), and appears at 32a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on July 3, 1995 (1a). The court of appeals denied petitioner's timely-filed petition for rehearing on September 8, 1995 (109a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory provisions involved in this appeal are 18 U.S.C. § 3161 and 3162, which are set out in full at 115a-125a. The subparts of those statutes most pertinent to this appeal are as follows:

18 U.S.C. § 3161:

> (h) The following periods of delay shall be excluded . . . in computing the time within which the trial . . . must commence:

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[1] References to the separately-bound Appendix to this Petition are in the form "1a".

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

. . . .

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

18 U.S.C. § 3162(a):

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter [18 U.S.C. §§ 3161 *et seq.*] and on the administration of justice.

INTRODUCTION

This is a case in which the court of appeals agreed with petitioner that his rights under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, had been violated. The court of

appeals further agreed with petitioner that the district court should have granted his motion to dismiss the indictment. Nonetheless, the court of appeals affirmed petitioner's conviction for violating the RICO statute, 18 U.S.C. § 1962, on the unprecedented basis that the district court's error in not dismissing the indictment had been "harmless":

> Given dismissal without prejudice, the government would have been free to seek to have Gambino reindicted; and even the appellant now concedes that reindictment would have been inevitable. As the government had already managed in fact to indict Gambino a total of three times on virtually identical charges, . . . we may comfortably assume that a fourth indictment would have been readily forthcoming. Thus, Gambino's position today would be no better even if the district court had dismissed the superseding indictment.
>
> We conclude, accordingly, that the error was harmless, and that Gambino's conviction must stand (19a).

Accordingly, this case squarely presents an issue of substantial national importance to the application of the Speedy Trial Act: Whether "harmless error" analysis can *ever* be applied to affirm a conviction notwithstanding a finding that there has been a violation of the Act. As we detail below, the court of appeals' application of harmless error analysis to the Act is unprecedented and insupportable. It flies in the face of the express language of the Act as interpreted by this Court in *United States v. Taylor*, 487 U.S. 326 (1988), and by every other appellate decision we have located.

Indeed, if the decision below is not reversed, the mandatory dismissal provisions of the Act — and with them the entire prophylactic purpose of the Act — will be effectively rendered a dead letter. For if the likelihood of reindictment becomes the test (as it surely would under the decision below), then the Government will almost always be able to claim that reindictment is likely and hence, that failure to dismiss (and logically, even violations of the Act) are harmless error.

In addition, granting review in this case will allow the Court to resolve a sharp conflict among the circuits on the important question whether the time limits of the Speedy Trial Act are tolled — and hence effectively circumvented — by the simple expedient of a district court's deferring its ruling on a pretrial motion (such as a motion to suppress) until during or after the trial. Although the court below decided this issue in petitioner's favor in finding that the Act had been violated here, the Government will undoubtedly argue that the contrary view, espoused by the Fourth and Eleventh Circuits, provides an alternative ground for affirmance, *i.e.*, that there was no Speedy Trial violation.

The petitioner's name may be notorious in the minds of many. It is just such cases, however, that test the fair and impartial administration of justice. "Once we embark upon shortcuts by creating a category of the 'obviously guilty' whose rights are denied, we run the risk that the circle of the unprotected will grow." *United States v. Tribote*, 297 F.2d 598, 604 (2d Cir. 1961) (Kaufman, J.). Infamous defendants "are no less entitled to the protection . . . afforded by" provisions like the Speedy Trial Act. *See United States v. Ruggiero*, 846 F.2d 117, 129 (2d Cir. 1988) (Lumbard, J., dissenting). Indeed, the Act was crafted by Congress not only to protect defendants, but to serve the public interest as

well. Yet a "harmless error" rule born of notoriety now threatens the integrity of that statutory structure.

STATEMENT OF THE CASE

A. The Charges Against Petitioner

Petitioner was originally indicted in 1990, together with John Gotti, Frank Locascio and Salvatore Gravano, on RICO charges of conducting a pattern of racketeering activity through an enterprise known as the "Gambino Crime Family". Although the indictment included multiple predicate acts of murder, bribery, obstruction of justice and tax fraud, the predicate acts charged against petitioner were limited to allegations that he supervised an illegal gambling business in Connecticut and related extortionate credit and (under a superseding indictment) Travel Act violations.

Petitioner was ultimately convicted of a substantive RICO violation and conspiracy. He was sentenced to 5 years' imprisonment followed by 5 years' supervised release and fined $100,000 (111a-113a).

B. The Speedy Trial Act Violation

The chronology that gives rise to the Speedy Trial Act claim in this case was as follows:

December 12, 1990: The original indictment was filed against petitioner, John Gotti, Frank Locascio and Salvatore Gravano.[2] On the same day, there was an order of exclud-

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[2] The District Court for the Eastern District of New York (Glasser, D.J.) had jurisdiction under 18 U.S.C. § 1962.

able delay based upon the district court's determination that this was a complex case. *See* 18 U.S.C. §3161(h)(8)(B)(ii).

June 26, 1991: Petitioner moved to dismiss the charges against him, asserting that a portion of the government's proof was derived from his immunized grand jury testimony. The district court deferred ruling on petitioner's request for an evidentiary hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), until after completion of trial.

October 23, 1991: On the Government's motion, petitioner was severed from the Gotti indictment so that petitioner could be tried on unrelated state charges brought under the New York criminal antitrust statute.

April 2, 1992: The trial of Gotti and Locascio ended with guilty verdicts; Gravano had earlier pleaded guilty and become a government witness. By this time, petitioner's New York state trial had also concluded.

April 3 through August 3, 1992: There was complete silence from the Government.

August 4, 1992: A superseding indictment charging violations of 18 U.S.C. § 1962(c) and (d) was unsealed and filed against petitioner and two new defendants, Giuseppe Gambino and Philip Loscalzo. The charges against petitioner were the same as those alleged against him in the original Gotti indictment, except that violations of the Travel Act were added as RICO predicate acts and as a substantive count.[3]

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[3] The substantive violation of the Travel Act, 18 U.S.C. § 1952, contained in Count Three of the superseding indictment, was dismissed prior to trial on venue grounds. *Gambino*, 818 F. Supp. at 550 (102a). The Government did not appeal.

August 14, 1992: Petitioner was arraigned on the superseding indictment.

August 21, 1992: At a pre-trial conference, trial was scheduled for February 1, 1993. An order of excludable delay based on §3161(h)(8)(B)(ii), the complex case exclusion, was entered. The exclusion covered only the period from August 21, 1992 to February 1, 1993. Nothing was said about the period preceding August 21, 1992.

December 7, 1992: Petitioner filed a timely motion seeking, *inter alia*, dismissal of the superseding indictment on the ground that the Speedy Trial Act had been violated by the 140-day gap between the end of the John Gotti trial on April 2, 1992 and the August 21, 1992 order of exclusion.

April 15, 1993: The district court denied petitioner's motion under the Speedy Trial Act. *Gambino*, 818 F. Supp. at 550 (83a-102a).

April 19 through May 11, 1993: In a jury trial, petitioner was found guilty. Guiseppe Gambino was acquitted of all charges; Loscalzo had died before trial.

July 16, 1993: Following a hearing, the district court denied petitioner's *Kastigar* motion.

C. The Court of Appeals' Finding of a Speedy Trial Act Violation

Noting that "[t]he government has advanced several reasons for its delay in bringing Gambino to trial . . . [and] [t]he district court added another" (6a), the court of appeals undertook an extensive analysis in concluding that the Act had been violated by the 140-day delay beginning with the conclusion of the John Gotti trial on April 2, 1992.

First, the court of appeals rejected the government's claim that the characterization of the case as "complex" served to exclude time under the Act after the John Gotti trial had been completed:

> Generally a trial court should set at least a tentative trial date in granting a complex case exclusion . . . . Thus, we think the December 1990 order of excludable delay is best understood as having been made in contemplation of the commencement of trial on the original indictment. Despite the fact that his own case had been severed, Gambino's speedy trial clock therefore ceased to be tolled when that trial took place . . . . (8a)

Second, the court of appeals addressed the fact that, after filing of the superseding indictment in August 1992, counsel for petitioner sought a delay in the trial, informing the district court that such delay would not raise any speedy trial problems. The court of appeals correctly recognized, however, that the Act had already been violated by August 1992. Hence, while acknowledging that deliberate conduct by a defendant could result in waiver of the protections of the Act, the court concluded that there had been no such conduct in this case (11a-16a).

Third, the court of appeals found that, because the addition of new codefendants in the superseding indictment occurred *after* the Act had been violated, it did not authorize the prior delay:

> Under the circumstances of this case the belated joinder of new co-defendants took place too late to reset the appellant's speedy trial clock. Appellant's case was joined with those

> of Loscalzo and Giuseppe Gambino in the superseding indictment only *after* the challenged delay. We are unable to identify any cases holding that joinder effectively resets a defendant's speedy trial clock to zero after that defendant's speedy trial right has already been violated by delay. Such a result, moreover, would open the door to prosecutorial abuse, permitting 70-day extensions to be unilaterally obtained by means of sequentially indicting co-defendants. (17a)

Fourth, and finally, rejecting the government's reading of *Henderson v. United States*, 476 U.S. 321 (1986), the court of appeals agreed with the Ninth Circuit, and rejected the position of the Fourth and Eleventh Circuits, on the issue whether the Speedy Trial clock had been tolled by virtue of the district court's deferral until after trial of the hearing that petitioner had sought long before trial on his *Kastigar* motion (*see* pp. 7-8 above):

> In the case at hand we are faced with the not uncommon circumstance of a trial judge postponing an evidentiary hearing until the conclusion of the case in chief. In such circumstance, the pendency of the motion no longer consumes the court's time and attention. The motion has in effect been tabled. Yet the government would have us rule that the fact of a pending motion cancels the time requirements of the Speedy Trial Act. Obviously were we to so hold, perpetual postponements would become routine in every case where a defendant seeks an evidentiary hearing.

The question is whether the Supreme Court's ruling in *Henderson* compels this result. Two circuits have recently disagreed as to the answer. In *United States v. Riley*, 991 F.2d 120 (4th Cir.), *cert. denied*, ____ U.S. ____ 114 S. Ct. 392 (1993), the Fourth Circuit ruled that when a hearing on a pretrial suppression motion is deferred until after trial, all of the time from the filing of the motion until its disposition is properly excluded under § 3161(h)(1)(F). It said that a motion so deferred does not "los[e] its character as a 'pretrial' motion for purposes of § 3161." 991 F.2d at 123. *Riley* also noted that Fed.R.Crim.P. 12(b) "does not define the term 'pretrial' by whether a motion is in fact decided before trial." *Id.* (emphasis in original).[4] In contrast, *United States v. Clymer*, 25 F.3d 824 (9th Cir. 1994), construing the same subdivision of § 3161(h) stressed the word "resulting" rather than the word "pretrial." The Ninth Circuit thought it was error to exclude all delay that coincides with the motion's pendency because delay under the express terms of the Speedy Trial Act may be excluded "only when it in some way results from the pendency of the motion." *Id.* at 830.

We agree with the Ninth Circuit that Congress envisioned that the speedy trial clock be tolled when the expenditure of judicial resources to decide the motion would interfere

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[4] In *United States v. Beard*, 41 F.3d 1486 (11th Cir. 1995), the Eleventh Circuit followed *Riley*.

> with the case expeditiously proceeding to trial, and not tolled when the postponement of a pretrial motion until after trial does not effect a trial court's ability to proceed. We believe therefore Gambino's pretrial motion did not toll his speedy trial clock from the time that the hearing on the motion was postponed until after his trial. The government may not therefore rely on the pendency of this motion to excuse its delay. *Were we to agree with the Fourth Circuit*, the pretrial motion would have tolled the speedy trial clock and that would of course completely excuse the government's delay.

(10a-11a) (emphasis and footnote added).

D. The Court of Appeals' "Harmless Error" Rationale

Although the court of appeals flatly concluded that, for the foregoing reasons, "[t]he district court erred . . . in not finding that the Speedy Trial Act was violated" (17a), it nevertheless affirmed petitioner's conviction. The sole basis for affirmance was the conclusion that the district court's error in refusing to dismiss the indictment had been "harmless":

> We recognize that the district court said that had it dismissed the indictment, it would have done so without prejudice. In so ruling, the court correctly applied the statutory factors governing prejudice . . . .
>
> Given dismissal without prejudice, the government would have been free to seek to have Gambino reindicted; and even the appellant now concedes that reindictment would

have been inevitable. As the government had already managed in fact to indict Gambino a total of three times on virtually identical charges, *see* 818 F. Supp. at 542-43, we may comfortably assume that a fourth indictment would have been readily forthcoming. Thus, Gambino's position today would be no better even if the district court had dismissed the superseding indictment.

We conclude, accordingly, that the error was harmless, and that Gambino's conviction must stand. Nonetheless, we hasten to add that our holding is not a signal that affirmance of a district court's failure to dismiss an indictment on harmless error grounds, so long as a "without prejudice" analysis is undertaken as mandated by the Act, will routinely follow. On the contrary, since we review the question of prejudice *de novo*, nondismissal in the event of a violation will always risk nullifying an entire trial. Reversible error, in a case as complex and hard-fought as this one, would have been costly indeed (18a-19a).

REASONS FOR GRANTING THE WRIT

I. THE "HARMLESS ERROR" DOCTRINE CANNOT BE USED TO CIRCUMVENT THE GOVERNMENT'S VIOLATION OF TIME LIMITS IMPOSED BY THE SPEEDY TRIAL ACT.

A. Established Principles of Statutory Interpretation Compel Reading the Speedy Trial Act to Preclude "Harmless Error" Analysis.

In recent years, this Court has emphatically insisted that the judiciary should take the Legislative branch at its word:

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992) (*quoting Rubin v. United States*, 449 U.S. 424, 430 (1981)) (other citations omitted). *Accord, United States v. Alvarez-Sanchez*, ___ U.S. ___, 114 S. Ct. 1599, 1603 (1994); *Good Samaritan Hospital v. Shalala*, ___ U.S. ___, 113 S. Ct. 2151, 2157 (1993); *Pioneer Investment Services Co. v. Brunswick Associates*, ___ U.S. ___, 113 S. Ct. 1489, 1495 (1993); *Reves v. Ernst & Young*, ___ U.S. ___, 113 S.

Ct. 1163, 1169 (1993); *Negonsott v. Samuels*, ___U.S.___, 113 S. Ct. 1119, 1122-23 (1993); *Estate of Cowart v. Nicklos Drilling Co., 505* U.S. 469, 476 (1992); *Ardestani v. Immigration & Naturalization Service*, 502 U.S. 129, 135-36 (1991).

Here, the language of 18 U.S.C. § 3162(a)(2) could not be more clear: "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the . . . indictment *shall be dismissed on* motion of the defendant" (emphasis added). As the Fourth Circuit held in *United States v. Jones*, 887 F.2d 492, 494 (4th Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990): "The decision to dismiss for noncompliance with the Speedy Trial Act with or without prejudice is within the discretion of the trial court . . . . That discretion, however, is not unlimited, *the Act mandating dismissal of an indictment*. . . ." (emphasis added).

Every other Circuit Court, including the Second Circuit, has agreed that the Act provides absolutely no room for discretion as to whether the indictment should be dismissed. *See United States v. McAfee*, 780 F.2d 143, 146 (1st Cir. 1984) ("Dismissal of the indictment is . . . *mandated"); United States v. Tunnessen*, 763 F.2d 74, 79 (2d Cir. 1985) ("the indictment *must be dismissed"); United States v. Lattany*, 982 F.2d 866, 871 (3d Cir. 1992) ("the indictment . . . *must be dismissed"); United States v. Castle*, 906 F.2d 134, 138 (5th Cir. 1990) ("Castle . . . was tried in violation of the Speedy Trial Act, *necessitating the reversal* of his conviction"); *United States v. Kottmyer*, 961 F.2d 569, 572 (6th Cir. 1992); ("district court was *required to dismiss the* indictment"); *United States v. Regilio*, 669 F.2d 1169, 1171 (7th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982) ("the indictment *must be dismissed"); United States v. Koory*,

20 F.3d 844, 846 (8th Cir. 1994) *("dismissal is mandatory"); United States v. Engstrom,* 7 F.3d 1423, 1426 (9th Cir. 1993) (the "sanction for a speedy trial violation *is dismissal"); United States v. Scalf,* 760 F.2d 1057, 1060 (10th Cir. 1985) (dismissal of the indictment is "*mandatory"); United States v. Miranda,* 835 F.2d 830, 834 (11th Cir. 1988) ("The Speedy Trial Act has been violated and *we must dismiss* this case") (emphasis added in all quotations).

Notwithstanding this uniform reading of the statute's plain language, the court of appeals in this case engrafted an unprecedented harmless error exception onto the Act's mandatory dismissal provision. In doing so, the court effectively read the "dismissal without prejudice" provision out of the Act. If, as the court concluded, the operative inquiry is whether the defendant would have been reindicted, reversals for failing to dismiss without prejudice will only be available, as a practical matter, when the statute of limitations has run. This result is inevitable because, given that a prosecutor is not obligated to present either admissible evidence, *Costello v. United States,* 350 U.S. 359 (1956), or exculpatory evidence, *United States v. Williams,* 504 U.S. 36 (1992), to the grand jury, reindictment after a dismissal without prejudice is virtually certain in all cases.

When, then, could a failure to dismiss without prejudice ever (absent running of the statute of limitations) *not* be a harmless error? Under the court of appeals' analysis, the answer to this question is never. The refusal to grant a dismissal without prejudice will *always* be harmless error under the opinion below because reindictment will always be inevitable. This being so, adoption of a harmless error rule in this circumstance will gut the "dismissal without prejudice" remedy provided by the Act. Surely, Congress did not intend to include a meaningless remedy in a carefully drafted

statute.[5]

Moreover, the goal of deterring future violations of the Act, so fundamental to the statutory scheme, is fatally undermined by the court of appeals' decision. The decision will inevitably encourage the government both to ignore the Act and to engage in brinkmanship before the district court. Prior to the court's decision, one of the strongest incentives for the government to adhere to the Act (and to take reasonable positions in response to motions to dismiss under the Act) was the possibility that it might have to reindict and retry a case if it were reversed on appeal. Now, however, this salutary threat has been removed, since the government will know that reversal is highly unlikely when a conviction is obtained after an erroneous district court refusal to dismiss an indictment without prejudice. The inevitable result will be increased violations of the Act, together with hardened and more unreasonable government responses when defendants seek relief from those violations.

Dismissal of the indictment in this case is the result mandated by Congress, as well as by the past decisions of this Court. Congress *could* have granted district courts discretion not to dismiss an indictment where reindictment appears likely. Yet, it chose not to do so. By its decision

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[5] Also relevant here are cases such as *Brock v. Pierce County*, 476 U.S. 253 (1986), and *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), which stand for the proposition that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, ___ U.S.___, 114 S. Ct. 492, 506 (1993). As a matter of common sense, the converse of this proposition should also apply: Where a statute unequivocally specifies a remedy, courts should not create exceptions to that sanction.

here, the court of appeals has in turn chosen to reverse that Congressional determination. This is a choice that it did not have the power to make.

B. This Court's Interpretation of the Speedy Trial Act Precludes "Harmless Error" Analysis.

Beyond the plain language of the Act, this Court in *United States v. Taylor*, 487 U.S. 326 (1988), interpreted the Act in a manner that precludes the "harmless error" approach adopted by the court of appeals. The decision below is inconsistent with *Taylor's* controlling interpretation of the Act for at least three reasons.

First, in *Taylor*, this Court reversed dismissal of an indictment with prejudice on the ground that the district court had not given due deference to the option of dismissing without prejudice. In so holding, the Court made it crystal clear that the issue of prejudice to the defendant — the same fundamental inquiry that must be undertaken in any harmless error analysis — is an issue that Congress directed the courts to address *only* in determining whether to dismiss with or without prejudice:

> There apparently were those in Congress who thought courts should consider prejudice to the defendant before barring reprosecution. *See* 120 Cong. Rec. 41778 (1974) (remarks of Representative Dennis); *id.*, at 41795 (remarks of Representative Conyers). After suggesting that he might offer an amendment to add that factor to the statute's list of considerations for the court, Representative Dennis agreed to establish through "legislative history" the relevance of prejudice to the defendant. *Ibid.* Representative Cohen, the author of the

> compromise amendment, agreed that prejudice to the defendant was relevant, *id.*, at 41794-41795, but opposed adding that factor to § 3162(a)(2) for fear that district courts would treat a lack of prejudice to a defendant as dispositive: "[W]e [should] not consider it as a separate independent ground for the prosecution and open up to the Justice Department and the prosecutor to say we have not met the time limit and we did not take advantage of all the other time exemptions, but there is no prejudice to the defendant. I do not think that would be a sufficient basis in the consideration of the other factors to determine if justice would be done." 120 Cong. Rec., at 41795. Representative Cohen's amendment was thereafter adopted without further modification. *Although the discussion in the House is inconclusive as to the weight to be given to the presence or absence of prejudice to the defendant, there is little doubt that Congress intended this factor to be relevant for a district court's consideration [in deciding to dismiss with or without prejudice].*

487 U.S. at 333-34 (collecting cases) (emphasis added; footnote omitted).

Taylor thus stands unequivocally for the proposition that harm to the defendant is a matter to be taken into account in connection with the type of dismissal authorized by the Act, and not with the question whether or not there should be a dismissal.

Second, dissenting in *Taylor,* Justice Stevens argued that the district court's decision to dismiss with prejudice

should be upheld because, *inter alia,* "[a]s a district judge, I would know that a dismissal without prejudice would be a rather meaningless sanction unless, of course, the statutes of limitations had run, in which event the choice between dismissal with and without prejudice would itself be meaningless." 487 U.S. at 350.

The Taylor majority explicitly rejected this reasoning. Most significantly, recognizing that "[d]ismissal without prejudice *is not a toothless sanction,*" this Court went on to explain:

> [I]t forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds. Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, substantial delay well may make reprosecution, even if permitted, unlikely. If the greater deterrent effect of barring reprosecution could alone support a decision to dismiss with prejudice, the consideration of the other factors identified in § 3162(a)(2) would be superfluous, and all violations would warrant barring reprosecution.

487 U.S. at 342 (emphasis added; footnote omitted).

Thus, the unmistakable import of *Taylor* is that dismissal without prejudice has a salutary purpose — deterring future violations — even if reindictment may be a foregone conclusion. Yet, in deciding this case solely on the basis of whether the defendant was prejudiced — *i.e.*, harmed — by the failure to dismiss without prejudice, the court of appeals ignored the fundamental structure underlying the dismissal remedies of the Act as interpreted in *Taylor.* In so doing, the court of appeals effectively transformed the remedy

of dismissal without prejudice into the very "toothless sanction" that this Court has rejected. *See Taylor,* 487 U.S. at 342.[6]

Third, § 3162(a)(2) (cited by the court in the preceding passage in *Taylor)* states that "[i]n determining whether to dismiss the case with or without prejudice, the court *shall* consider, among others, each of the following factors . . ." (emphasis added). In *Taylor,* this Court reversed the district court because, *inter alia,* it had failed to consider some of the factors that the Act mandates must be considered in deciding whether to dismiss with or without prejudice. Yet the word requiring consideration of these factors — *"shall"* — is the same word that Congress used to govern dismissal of an indictment earlier in the same paragraph of the Act: "the indictment . . . *shall* be dismissed . . . ." (emphasis added). There is no basis for concluding that Congress intended to give the word "shall" two different meanings in the same paragraph. *See Ratzlaf v. United States,* ___U.S.___, 114 S. Ct. 655, 660 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it

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[6]Indeed, in the course of its harmless error discussion, the court of appeals explicitly acknowledged the foregoing considerations, stating:

> The government violates the Act at its peril. Forcing the government to reindict a defendant after a Speedy Trial Act violation may seem a "purposeless formalism," 818 F. Supp. at 548 [96a], but *it is the sanction Congress saw fit to impose, and it was therefore the district court's duty to impose it.* (18a) (emphasis added).

Inexplicably, however, the court of appeals went on to ignore the very principle it had just stated by finding the error to be harmless.

appears"). Indeed, this Court recognized as much in *Taylor* when it stated:

> Ordinarily, a trial court is endowed with great discretion to make decisions concerning trial schedules and to respond to abuse and delay where appropriate. The Speedy Trial Act, however, confines the exercise of that discretion more narrowly, *mandating dismissal of the indictment upon violation of precise time limits, and specifying criteria to consider in deciding whether to bar reprosecution.*

487 U.S. at 343-44 (emphasis added).

C. This Court's Recent Analyses of the Harmless Error Doctrine Preclude Its Application to the Speedy Trial Act.

The decision below is also inconsistent with this Court's decisions in *Arizona v. Fulminante,* 499 U.S. 279 (1991), and *Brecht v. Abrahamson,* ___U.S.___, 113 S. Ct. 1710 (1993), which analyzed and applied the "harmless error" doctrine. In both *Fulminante* and *Brecht*, the Court distinguished between "trial error," which is subject to harmless error review, and "structural defects," which are subject to a *per se* rule of relief.

As defined by the Court in *Fulminante,* "trial error" is —

> error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

499 U.S. at 307-08; *see Brecht,* 113 S. Ct. at 1717.

In contrast, "structural defects" are those deficiencies "in the constitution of the trial mechanism" —

> which defy analysis by "harmless error" standards. The entire conduct of the trial from beginning to end is obviously affected . . . . [A] . . . structural defect affect[s] the framework within which the trial proceeds, rather than [being] simply an error in the trial itself.

Fulminante, 499 U.S. at 309-10; *see also Brecht,* 113 S. Ct. at 1717 ("structural defects" require "automatic reversal of the conviction because they infect the entire trial process").

Under these definitions, recently articulated by this Court, violations of the Speedy Trial Act cannot be deemed "trial error." Rather, failure to dismiss results in a defendant being tried on an indictment that is invalid under the Act. Accordingly, the error in refusing to dismiss is a "structural defect[ ] in the trial mechanism . . . affecting the framework within which the trial proceeds." It fatally "infect[s] the entire trial process." The court of appeals thus erred in applying harmless error analysis to a "structural defect" which, by definition, "def[ies such] analysis." *Fulminante, supra; Brecht, supra.*

Put another way, the court of appeals misconstrued the nature of the district court's error, which may not be fairly characterized as a simple failure to recognize that the Act had been violated. Rather, the error was in not dismissing the indictment as required by the Act. This is so because once violation of the Act is established, a district court *must* dismiss. It thus becomes clear that harmless error analysis should not be employed because the relief that the defendant

was erroneously denied is an end in itself: termination of the proceedings against him. It is the nature of the error — a direct failure to terminate the proceedings — that renders the error "structural" in nature.

As another court of appeals recently recognized in an analogous context (involving an Internal Revenue Service subpoena issued under 26 U.S.C. § 7609(f)) the government's failure to follow procedures mandated by statute should not be deemed harmless error because those "procedures represent a basic legislative judgment about the importance of taxpayers' privacy and other rights — *and courts must respect that judgment.*" *United States v. Gertner,* 65 F.3d 963, 971-72 (1st Cir. 1995) (emphasis added).

In contrast, "trial errors" require an additional layer of analysis. For example, when a trial court errs in refusing to exclude evidence, determining the remedy requires an assessment of all other evidence as well. An appellate court must decide, first, whether there was an error, and second, whether a sanction (reversal) should be imposed. A finding of error by the trial court therefore requires a secondary inquiry into the likelihood that the defendant is guilty absent the challenged evidence. *See Fulminante,* 499 U.S. 309. This is the essence of "trial error." Where the Act is violated, though, there is no need for a secondary analysis on the issue of sanction because that issue has been resolved by the Act itself, which does not direct or allow the court to consider the defendant's probable guilt or innocence.

II. THIS APPEAL PRESENTS A CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT ISSUE WHETHER DEFERRING A RULING ON A PRETRIAL EVIDENTIARY MOTION INDEFINITELY TOLLS THE TIME LIMITS UNDER THE SPEEDY TRIAL ACT.

In affirming petitioner's conviction based upon a harmless error determination, the court of appeals rejected the government's argument that the Act had not been violated because resolution of petitioner's *Kastigar* motion (*see* pp. 7-8 above) had been deferred until after trial. In so ruling, the court of appeals sided with the Ninth Circuit's decision on this issue in *United States v. Clymer,* 25 F.3d 824 (9th Cir. 1994), and explicitly declined to follow the contrary conclusion reached by the Fourth Circuit in *United States v. Riley*, 991 F.2d 120 (4th Cir.), *cert. denied,* ___U.S.___, 114 S. Ct. 392 (1993). The Fourth Circuit's view was also later adopted by the Eleventh Circuit in *United States v. Beard,* 41 F.3d 1486 (4th Cir. 1995).

Although the court of appeals agreed with petitioner on this issue, granting this Petition would enable the Court to resolve this conflict, which has significant implications for the fair and consistent administration of justice in the federal courts. If review is granted in this case, the Government will undoubtedly renew its argument and seek affirmance of petitioner's conviction on the ground that there was no violation of the Act. In light of the fact that four circuits have now addressed the issue in detail and split into two sharply divided camps, review is clearly warranted. This appeal provides an appropriate vehicle for this Court to resolve the conflict.

Moreover, the issue is an important one. In *Henderson v. United States,* 476 U.S. 321 (1986), this Court held that, in computing periods of delay under the Speedy

Trial Act, courts must exclude all time consumed by pretrial motions — from filing through ultimate decision — regardless of whether the amount of time taken by the trial court in that process is reasonable. Following *Henderson,* the circuit courts have split on the question whether the mere pendency of a pretrial motion, without a decision thereon, and irrespective of what other proceedings may have occurred, serves to toll the Speedy Trial Act clock indefinitely.

In the first appellate decision to address the issue, *United States v. Riley*, 991 F.2d 120 (4th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 392 (1993), the trial court had deferred resolution of a pretrial motion to suppress evidence until such time as the government decided to offer the evidence. Thereafter, a mistrial was granted prior to resolution of the motion. Relying upon *Henderson,* the Fourth Circuit held that the time between the mistrial and the start of the new trial was excludable because the motion to suppress was still pending. The Fourth Circuit stated: "[T]here is no requirement that this time be justified as reasonable." *Riley,* 991 F.2d at 124. In *United States v. Beard,* 41 F.3d at 1489, the Eleventh Circuit chose to follow *Riley.*

On the other hand, in *United States v. Clymer,* 25 F.3d 824 (9th Cir. 1994), the Ninth Circuit reached the opposite conclusion. It rejected the government's claim that the deferral of a motion to dismiss the indictment based upon outrageous government conduct tolled the Speedy Trial clock until the conclusion of trial:

> According to its plain terms, § 3161(h)(1)(F) applies only when the *delay in bringing the case to trial is the result of the pendency of a pretrial motion.* That provision does not refer to delay "coinciding with" or "accompanying"

> the pendency of a motion. It refers only to delay "*resulting from* any pretrial motion." By phrasing the exclusion in this way, Congress clearly expressed its intent to toll the Speedy Trial Act clock when the need to decide the motion would interfere with the case's proceeding to trial. Equally clearly, Congress did not intend to allow district courts to render the time limits in the Act a nullity by setting motions for hearing at the time of trial or after trial and thereby making all time prior to trial excludable. In short, under the plain language of the statute, delay is excludable only when it in some way *results from the pendency of the motion.*

25 F.3d at 830 (emphasis added). The court below considered the same issue at length, carefully reviewing the Fourth and Ninth Circuit decisions. *See* pp. 10-12 above. It expressly adopted the Ninth Circuit's view and rejected that of the Fourth Circuit.

With the decision in this case, the split amongst the circuit courts has deepened and crystallized as to whether *Henderson* permits the strictures of the Act to be avoided in perpetuity simply by deferring resolution of a pretrial motion until during or after trial. This split is enough in itself to justify granting this Petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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